NETWORK 'PUBLIC CONTRACTS IN LEGAL GLOBALIZATION'

Amsterdam-Vigo Research Project

The impact of competitive tendering on the execution of public contracts and concession contracts

1. Research topic and research questions

Contracting authorities[1] award public contracts[2] and concession contracts[3] to economic operators[4] by means of competitive tendering procedures. In the European Union, and also in many countries outside the Union, the statutory duties of contracting authorities regarding such procedures are regulated by public procurement law.[5] One important objective pursued by public procurement law is the opening-up of the market of public contracts and concession contracts for economic operators. In order to achieve this objective, public procurement law imposes duties upon contracting authorities to treat economic operators equally and without discrimination, and to act in a transparent and proportionate manner when awarding contracts.

Once a competitive tendering procedure has resulted in a contract award decision, the contracting authority and the economic operator[6] to whom the contract has been awarded may get entangled in issues related to the execution of the contract. Parties may, for example, hold differing views as to the interpretation of an ambiguous term in their contract. Alternatively, the issue may involve a claim of the economic operator for extra payment under the contract on the basis of various allegations: his tender turns out to be unprofitable as a result of incorrect information provided by the contracting authority during the tendering procedure; or the circumstances existing at the time of his tender turn out to have changed considerably in the course of the execution of the contract.

Sometimes, the parties will be able to solve these issues in an amicable manner. Occasionally, however, the issues will amount to disputes that must be decided by a third party, most likely a court of law. Resolving these issues will involve the application of rules of substantive law applicable to the execution of the contract. These rules are either part of general administrative law, general private law, or common law, depending on the legal system concerned.[7]

1 See Article 2(1)(1) Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, and Article 6(1) Directive 2014/23/EU of 26 February 2014 on the award of concession contracts.
2 See Article 2(1)(5) Directive 2014/24/EU.
3 See Article 5(1) Directive 2014/23/EU.
4 See Article 2(1)(10) Directive 2014/24/EU and Article 5(2) Directive 2014/23/EU.
5 See for instance in the European Union: Directives 2014/23/EU, 2014/24/EU and 2014/25/EU.
6 In case of a concession contract: the 'concessionaire', see Article 5(5) Directive 2014/23/EU.
7 Moreover, in some legal systems, these rules of substantive law are embraced by a broad definition of the notion 'public procurement law', whereas in other legal systems the latter notion is only used

In this project it is assumed that the framework, within which the aforesaid issues related to the execution of the contract will have to be resolved, is somewhat peculiar for two coherent reasons.

Firstly, the framework is peculiar from a *factual* point of view. In order to understand this, one has to take into account that the public contract or concession contract has been awarded following a competitive tendering procedure involving multiple competing economic operators and not – as is regularly the case with contracts concluded between private entities – after direct negotiations between two parties only, without any call for competition. The main implication of this difference is that additional interests become involved in the first situation in comparison to the second situation. These obviously include the interest inherent in the opening-up of the market of public contracts and concession contracts, hereinafter referred to as: the competition interest.[8]

Secondly, the framework is peculiar from a *legal* point of view. In the first situation, the competitive tendering procedure and the contract award that precede the contract execution stage are subject to specific regulation in many legal systems, taking into account the aforesaid competition interest. Such regulation does not apply in the second situation, where a contract is agreed upon between two private parties following ordinary direct negotiations.

This project seeks to investigate, problematize, and clarify the possible interaction between the competition interest, as well as its regulation, inherent in competitive tendering on the one hand, and the execution of public contracts and concession contracts on the other. The project is based on the assumption that the particular factual and legal context of competitive tendering must be taken into account by the courts when they apply rules of substantive law in order to resolve issues related to the execution of contracts. If this assumption turns out to be correct, it would further mean that the resolving of issues by the courts could, in its turn, have an impact on the competition interest. If that is indeed proven to be the case, the results of the project could be relevant for the further debate on public procurement regulation.

Based on the aforesaid assumptions, this project seeks to answer the following three research questions.

(1) In the event that a national court of law must resolve issues regarding the execution of a public contract or a concession contract by applying rules of substantive law (general administrative law; general private law; common law, depending on the legal system concerned), will the court take into account the particular factual and legal context of the competitive tendering procedure? If so: how will the court do this? If not: why not?

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to indicate those rules that relate to the award of public contracts and concession contracts by means of competitive tendering procedures.

8 Another factual difference relates to the bargaining power of the parties involved in the two situations. In the second situation, it is possible – although not necessarily so – that the two private parties will have had equal bargaining power when they negotiated the content of their contract. In the first situation, however, it is inherent in the competitive tendering procedure that the contracting authority will have had the power to dominate the content of the subsequent contract.

(2) To what extent is it possible to problematize and/or unify the various approaches that are found in the answers to question (1)?

(3) Based on the aforesaid analysis, to what extent is it possible and necessary to give recommendations to national courts, legislators and perhaps even the supranational legislators (*e.g.* the European Union) as regards the subject matter?

2. Research approach

The general idea is to answer research question (1) on the basis of an analysis of national case law, legal doctrine and (if any) regulation. This analysis is to be carried out on the basis of so-called 'case studies'. The results of the analysis are to be presented in a national report based. The joint national reports are subsequently to be developed into ideas for so called transnational papers, the focus of which is to contribute to the answering of the research questions (2) and (3).

This general idea can further be explained as follows.

The project focuses on the execution of public contracts and concession contracts awarded on the basis of a competitive tendering procedure regulated either by national, international and/or supranational legal instruments. Although the project takes as a starting-point the definitions of public contracts and concession contracts to be found in the EU Directives 2014/24/EU and 2014/23/EU, it is stressed here that the project is not confined to contracts that have been awarded following tendering procedures subject to the EU Directives and their implementation in the national laws of the EU Member States. This means that there are no restrictions as to the choice of the countries to be included in the project. It is intended, however, to actively search for the involvement in the project of researchers from EU countries to the extent that they seem to be underrepresented in the Network.

As explained in section 1 above, the contracting authority and the economic operator to whom the public contract or concession contract has been awarded, may get entangled in issues related to the execution of the contract. One of the major challenges of this project has been the draft of case studies that enable the researchers involved to explain how the rules of substantive law of their legal system are applied by the courts in order to resolve the said issues – see question (1) – and to do so in such a manner that the research results can be used as a basis for the answering of questions (2) and (3). Experience with comparative legal research carried out by large networks in the past has learned that it is not advisable to phrase case studies from the perspective of particular legal concepts and constructs, given that these are not always understood in the same manner in the various legal systems involved. This is already the case in the event that the object of research belongs to the domain of either private law, or public law, in all the countries covered by a particular project, leave alone if the object of research – as is the case with public contracts and concession contracts – is re-

garded to be part of the domain of private law in some countries, and considered to belong to public law in other countries.

Hence it seemed more advisable for the purpose of drafting the case studies to take as a starting-point descriptions of problematic issues that may occur in the course of the execution stage of a public contract or concession contract and to do so not in terms of legal concepts, but in terms of facts that have been stripped of their legal connotation. These factual descriptions provide the researchers with ample flexibility to explain how the courts in their legal systems apply rules of substantive law in order to resolve the said issues.

It follows from the assumptions underlying the research questions that the case studies are restricted to issues that could be problematized particularly from the perspective of the competition interest. Therefore, the case studies deal with the following issues:

(1) Contracting authority decides to abandon project after contract award decision and before conclusion of the contract

Contracting authority A undertakes a tendering procedure and decides to award the contract to tenderer B. This decision is communicated to all tenderers, including B. None of the other tenderers challenges the judicial review of A's contract award decision. Nevertheless, A subsequently decides to abandon the intended project and informs B accordingly.

A dispute arises between A and B on the question whether and to what extent A owes any duties to B.

(2) Winning tender is unprofitable as a result of tenderer's own error

Contracting authority A undertakes a tendering procedure and decides to award the contract to tenderer B. Subsequently, A concludes a contract with B. After the conclusion of the contract B argues that – due to his own error – he has offered a tender that is too low and that the contract has therefore become unprofitable for him. B further argues that A knew or reasonably should have known this at the time of conclusion of the contract.

A dispute arises between A and B on the question whether B is bound to the contract at all and – if so – whether and to what extent A owes a duty to compensate B for the loss suffered.

(3) Winning tenderer is unprofitable as a result of insufficient and/or incorrect information provided by or on behalf of contracting authority

Contracting authority A undertakes a tendering procedure and decides to award the contract to tenderer B. Subsequently, A concludes a contract with B. After the conclusion of the contract B argues that he has entered into the contract on the basis of insufficient and/or correct information provided to him by or on behalf of A and that the contract has become unprofitable for him as a result of this.

A dispute arises between A and B on the question whether B is bound to the contract at all and – if so – whether and to what extent A owes a duty to compensate B for the loss suffered.

(4) Parties hold differing meanings as to the interpretation of an ambiguous term in the contract

Contracting authority A undertakes a tendering procedure. Subsequently, A concludes a contract with B. In the course of the performance of the contract, it becomes clear that A and B hold differing meanings as to the interpretation of an ambiguous term in the contract.

A dispute arises between A and B on the question whether the contract is to be performed by the parties in accordance with A's interpretation. If so, the result would be that B will suffer financial loss. In the event that the contract is to be performed according to B's interpretation, this would be detrimental to A.

(5) Contract does not provide for a particular matter and may need supplementation with an additional term

Contracting authority A undertakes a tendering procedure and decides to award the contract to tenderer B. Subsequently, A concludes a contract with B. In the course of the performance of the contract, it becomes clear that the explicit terms of the contract do not provide for a particular matter.

A dispute arises between A and B on the question what should be the content of the additional term to be implied in the contract in order to deal with the matter not provided for in the contract.

(6) Contracting authority invokes an allegedly abusive contract clause

Contracting authority A undertakes a tendering procedure and decides to award the contract to tenderer B. Subsequently, A concludes a contract with B. In the course of the performance of the contract, A decides to invoke a particular contract clause. The consequences of this are, however, detrimental to B.

B argues that A cannot invoke the contract clause for reason that the clause is abusive. A dispute arises between A and B on the question whether A can invoke the contract clause.

(7) Circumstances existing at the time of conclusion of the contract have changed considerably in the course of the execution of the contract

Contracting authority A undertakes a tendering procedure and decides to award the contract to tenderer B. Subsequently, A concludes a contract with B. In the course of the performance of the contract, the circumstances that existed at the time of the conclusion of the contract change considerably. As a result of this change of circumstances, the performance of one or more obligations incumbent on B becomes onerous. Nevertheless, A decides to invoke B's obligation under the contract.

B argues that A cannot invoke performance of B's obligation for reason that performance of the obligation has become onerous. A dispute arises between A and B on the question whether A can invoke performance of the obligation of B.

(8) Contracting authority decides to invoke the alleged non-performance of a contractual obligation of the winning tenderer

Contracting authority A undertakes a tendering procedure. Subsequently, A concludes a contract with B.

In the course of the performance of the contract, A argues that B does not perform his obligation(s) in accordance with the contract. A decides to invoke this non-performance and to seek for remedies. A dispute arises between A and B on the question whether A is entitled to the remedies sought.

(9) Contracting authority decides to cancel the contract

> Contracting authority A undertakes a tendering procedure. Subsequently, A concludes a contract with B.
>
> It is undisputed between the parties that B performs his obligation(s) in accordance with the contract. In the course of the performance of the contract, A decides to cancel the contract. A dispute arises between A and B on the question whether and to what extent A owes any duties to B.

It follows from both the assumptions underlying the research questions – as well as the content of the case studies above – that the parties to the contract do not settle the issues themselves by means of an amicable agreement. Obviously, if they would do so, such agreement could be problematized from the perspective of the concept of substantial modification of the contract.[9] The fact, however, that the issues presented in the case studies amount to disputes between the parties that are to be resolved by a court of law does not make the latter concept irrelevant. After all, an important feature of the case studies is that the court is asked to intervene in the contractual relationship between the parties. Therefore, its decision to solve a particular issue may amount to a substantial modification of the contract.

For the purpose of answering research question (1), the analysis of each case study will involve the following. If one seeks to establish and evaluate the impact of the factual and legal framework of competitive tendering as well as its regulation on the application by the courts of rules of substantive law, it is required to first have a general overview of the rules considered relevant for each case study. The national reports should therefore first elaborate in general on these rules with no regard to the particular facts and circumstances of the case studies. Subsequently, the national report should clarify the application of the rules by the courts in the particular situation as shown in each case study. How do the national courts resolve the case studies? What is argued in legal doctrine on how the courts deal – or ought to deal – with them?

As has been explained above, the national reports will be used as a basis for the answering of research questions (2) and (3). This requires the joint national reports to be developed into ideas for papers dealing with transnational topics. There are two types of transnational topics that can be discerned for the purpose of this project.

Papers on transnational topics may first of all provide for a comparative legal analysis of the information presented in the national reports on the analysis of a particular case study. These papers may try to problematize and/or unify the various approaches found in the national reports as regards the particular case study and the resolving of its underlying issue (see also research question (2)). These papers may also investigate to what extent it is possible and necessary – again: as far as the particular case study is concerned – to give recommendations

9 See Article 72 Directive 2014/24/EU and Article 43 Directive 2014/23/EU.

to national courts, legislators, and perhaps even supranational legislators (see also research question (3)).

Secondly, papers on transnational topics may abstract from the particular case studies by taking a more generic, overall approach. One could think, for instance, of the differing impact that the rules of substantive law of the countries involved may have on the answers to research question (1), given the differing nature of these rules (*i.e.* general administrative law, general private law, or common law). Another possible transnational generic topic could be the development of a general theory on the impact that competitive tendering and its regulation may have on the application by national courts of rules of substantive law to issues involving the execution of public contracts and concession contracts (see also question (2)). Finally – based on how the research questions (1) and (2) can be answered – transnational generic topics could be related to the possible desirability – or: undesirability – of the improvement and/or supplementation of the regulatory framework for public procurement.

It follows from the above that the underlying project envisages a two-stage approach. Research questions (2) and (3) cannot be answered properly without national reports providing adequate information required for the purpose of answering research question (1). This means that the focus of the project during its first stage is on the design of the case studies and on the drafting of the national reports. It is tentatively suggested that researchers who are interested in getting involved in the project create national teams and jointly prepare the national report for their country. The advantage of working with national research teams during the first stage of the project is that it can facilitate both a swift and a qualitatively adequate and thorough analysis of the case studies. This will subsequently provide for a good basis for the second stage of the project: the development of ideas for the transnational topics and the preparation of transnational papers dealing with these topics. Given the differing nature of the rules of substantive law of the countries involved (general administrative law; general private law; common law) it is suggested to have the transnational papers written by research teams consisting of (at least two) researchers with differing legal backgrounds. It is assumed that these researchers also have contributed to the national report of their country.

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